



# Grievance Procedure Manual



## Department of Employment Dispute Resolution

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**[www.edr.state.va.us](http://www.edr.state.va.us)**

# Key to Illustrations

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*WHAT—the suggested or required action*



Formal  
meeting



Written  
document

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*WHO—the person(s) responsible for taking the action*



Employee



Management

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*WHEN—time allowed to take the action*



5 workdays



10 calendar  
days



30 calendar  
days

*Effective July 1, 2001.*

*Code of Virginia reference §2.1-116.01 et seq. (effective October 1, 2001,*

*Code of Virginia reference §2.2-1000-1001;3000-3008).*

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# **1** Ways to Resolve Workplace Disputes

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## **General Information**

§1.1

Complaints arising in the workplace should be resolved fairly and promptly. In selecting a suitable alternative to resolve a workplace dispute, an employee may obtain information and guidance from the Department of Employment Dispute Resolution (formerly the Department of Employee Relations Counselors) and the Human Resources Office at the employee's agency.

The Department of Employment Dispute Resolution ("EDR") can be reached by telephone at 786-7994 from Richmond, or toll free at 1-888-23-ADVICE (232-3842) from elsewhere in Virginia. Additional information is available on EDR's Web site: [www.edr.state.va.us](http://www.edr.state.va.us).

Most issues can be resolved through discussion. Other alternatives include the following:

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## **Mediation**

§1.2

One alternative for resolving disputes is the statewide **mediation** program run by EDR. Mediation is a voluntary process through which neutral third persons (mediators) assist people in conflict to explore their differences and develop their own solutions to their concerns. A decision to mediate a dispute does not prevent an employee from initiating a **grievance** later. Where the **parties** have entered into an agreement to mediate, the time requirements of the grievance procedure may be extended by mutual agreement. It is recommended that this agreement be in writing.

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## **Office of Equal Employment Services**

§1.3

If an employee thinks that she has been discriminated against, she may file a formal complaint with the Office of Equal Employment Services ("OEEES") at the Department of Human Resource Management (formerly the Department of Personnel and Training). OEEES investigates complaints of employment **discrimination** on the basis of race, color, gender (including sexual harassment), age, national origin, religion, political affiliation, or against otherwise qualified persons with disabilities. An employee may not pursue both an OEEES complaint and a grievance on the same matter. OEEES may be reached by telephone at 225-2136 from Richmond, or toll free at 1-800-533-1414 from elsewhere in Virginia.

**NOTE:** Words in **bold** appear in the Definitions Section, §9.

# 1 Ways to Resolve Workplace Disputes, continued

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## ***Grievance Procedure***

§1.4

EDR administers the grievance procedure under which most workplace disputes can be grieved to three successive levels of agency management. If the grievance is not resolved by agency management, the employee may seek to have the grievance resolved by an independent hearing officer. Only certain types of grievances, however, will qualify for such a hearing. The grievance procedure has strict rules that must be followed by all parties.

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## ***Retaliation Investigation***

§1.5

An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in the grievance procedure or for reporting, in good faith, an allegation of fraud, waste, or abuse to the State Employee Fraud, Waste and Abuse Hotline. Where EDR determines that the request merits further review, EDR's authority is limited to investigating the complaint and advising the **agency head** of its findings. EDR is authorized to provide no other relief. An employee may not pursue both a retaliation investigation and a grievance on the same matter.

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## ***Other Agency Resources***

§1.6

Other resources may be available for resolving workplace disputes. These resources may include: Equal Employment Opportunity officers, ombudsmen, or the services of other agencies such as the Council on Human Rights or the Department for Rights of Virginians with Disabilities.

## 2 Grievance Procedure Overview

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### *Stages of The Grievance Procedure*

§2.1

The grievance procedure contains four phases:

#### 1. Management Resolution Steps

- First Resolution Step
- Second Resolution Step Meeting
- Third Resolution Step

#### 2. Qualification for Hearing

#### 3. Hearing

#### 4. Review of Hearing Decisions

---

### *Informal Discussion*

§2.2

Prior to the initiation of a grievance, an employee should discuss the dispute with her supervisor in an attempt to resolve the problem informally. Even when such discussions are ongoing, however, the written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute. This 30-day requirement may be extended only if there is an agreement between the parties to waive this requirement or there is an agreement to mediate the dispute. Any such agreement should be in writing.

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### *Access to The Grievance Procedure*

§2.3

To access the grievance procedure, an employee must meet all of the following criteria:

1. Must not be listed as exempt from the Virginia Personnel Act under §2.1-116 of the Code of Virginia (effective October 1, 2001, §2.2-2905);
2. Must have been a non-probationary employee of the Commonwealth at the time the event that formed the basis of the dispute occurred; and,
3. Must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or **involuntary separation**).

Agency management may deny an employee access to the grievance procedure on any of these grounds at any point following receipt of a written grievance. If management denies the employee access to the grievance procedure, the employee may ask the agency head to grant her access. The employee must make a written request to the agency head within 5 **workdays** of receiving notification that access has been denied.

## 2 Grievance Procedure Overview, continued

The employee may appeal to EDR the agency head's decision to deny access. This appeal must be made within 5 workdays of the employee's receipt of the agency head's decision. If the employee appeals to EDR, the employee must submit her grievance form to the agency's Human Resources Office within 5 workdays of receiving notice that access to the grievance procedure has been denied. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all **attachments**, to EDR. (The original grievance record should be kept by the agency.)

If EDR denies the employee access, the employee may appeal to the circuit court. If the employee appeals to the court, the employee must submit her grievance form to the agency's Human Resources Office within 5 workdays of receiving EDR's access decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. The Human Resources Office must list the EDR Director as a copy recipient on the cover letter to the court accompanying the grievance record. (The original grievance record should be kept by the agency.) The decision of the circuit court is final and nonappealable.

If the employee is ultimately determined to have access to the grievance procedure, the grievance is returned to the appropriate resolution step for a response on the merits.

### *Initiating a Grievance*

§2.4



An employee must initiate a grievance on a fully completed "Form A". The "Form A" should be available at all state Human Resources Offices and is also available on EDR's Web site. The "Form A" must state the claim, the facts in support of the claim, and the relief requested. If there is not enough space on the "Form A" for a complete statement, attachments may be used. Once the grievance is initiated, additional claims may not be added.

An employee's grievance must:

1. Be presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance;
2. Arise in the agency in which the employee works;
3. Pertain directly and personally to the employee's own employment in a position with access to the grievance procedure;
4. Not be used to **harass** or otherwise impede the efficient operations of government;

WHO	WHEN

- Employee
- 30 calendar days



## 2 Grievance Procedure Overview, continued

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5. Not have been pursued through another state process (for example, a formal discrimination complaint filed with the Office of Equal Employment Services); and,
6. Not duplicate another grievance challenging the same action or arising out of the same facts.

If any of these requirements are not met, management may notify the employee, using the “Form A,” that the grievance will be administratively closed due to **noncompliance** (See “Grievance Initiation Noncompliance”, §6.2). The agency may raise noncompliance at any point through the agency head’s qualification decision.

To promote improved employee relations, management may allow a grievance to proceed through the resolution steps, even if the grievance does not comply with the above requirements. If the agency intends to allow the grievance to proceed through the management steps but plans to deny a hearing due to noncompliance, management should inform the employee of that intention as soon as it becomes aware of the non-compliance.

As a general rule, an employee must initiate a grievance with the **first-step respondent**, who is usually his immediate supervisor. However, under the following circumstances, the grievance is initiated with someone other than the immediate supervisor:

1. A grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor;
2. A grievance challenging the application of the layoff or recall policies should be initiated with the Human Resources Office of the employee’s agency; and,
3. A grievance involving a termination, demotion, suspension without pay, or any other action which results in a loss of wages may be initiated with the **second-step respondent** under the **Expedited Process**. Within five workdays of the second-step response, the employee may request the agency head to qualify the grievance for a hearing.

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### ***Gathering Information***

§2.5

After a grievance is initiated, a party may ask to review information that pertains to the grievance. See “Documentation Relating to a Grievance”, §8.2.

### 3 Management Resolution Steps

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#### *First Resolution Step*

§3.1

The first-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the “Form A”; and,
3. Notify the agency’s Human Resources Office of the grievance.



After receiving the written grievance, the first-step respondent should identify the issues, gather information and review the facts. A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within five workdays of receiving the grievance, the first-step respondent must provide a written response on the grievance “Form A” or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.



Within 5 workdays of receiving the first-step response, the employee must:

1. Indicate on the grievance form his intention to continue to the second-step meeting and submit the form to the second-step respondent; or,
2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.

WHO	WHEN

- Management
- 5 workdays

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- Employee
- 5 workdays

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#### *Second Resolution Step Meeting*

§3.2

The second-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the “Form A”; and,
3. Advise the agency’s Human Resources Office that the grievance has advanced.



Within 5 workdays of the second-step respondent’s receipt of the grievance, the second-step meeting must be held. The persons who may be present at this meeting are the employee, an individual selected by the employee, the second-step respondent, and an individual selected by the second-step respondent. Witnesses may be called by either party. These witnesses must not be present except while providing information.

The purpose of the second-step meeting is fact finding. The meeting should not be adversarial or treated as a hearing. Arguments and **cross-examination** are not allowed at this meeting. The meeting must not be recorded unless one of the parties has a disability that would be accommodated by recording the meeting.

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- Employee
- Management
- 5 workdays

### 3 Management Resolution Steps, continued



Within 5 workdays of the second-step meeting, the second-step respondent must provide a written response on the grievance “Form A” or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.



Within 5 workdays of receiving the second-step response, the employee must:

1. Indicate on the grievance form his intention to continue to the third-step and submit the form to the **third-step respondent**; or,
2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.

In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency’s second-step respondent, the employee may: (1) request that the agency designate another second-step respondent; or (2) waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.

#### ***Third Resolution Step***

§3.3

The third-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the “Form A”; and,
3. Advise the agency’s Human Resources Office that the grievance has advanced.



A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within 5 workdays of receiving the grievance, the third-step respondent must provide a written response on the grievance “Form A” or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.

WHO	WHEN

- Management
- 5 workdays

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- Employee
- 5 workdays

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- Management
- 5 workdays

### 3 Management Resolution Steps, continued



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Within 5 workdays of receiving the third-step response, the employee must:

1. Request on the grievance form that his grievance be qualified for a hearing\* and submit the form to the agency head; or,
2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.

\* **NOTE:** If the grievance is qualified for a hearing, the hearing decision will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

WHO	WHEN
	

- Employee
- 5 workdays

### 4 Qualification for a Hearing

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#### *Qualifying Actions*

§4.1

Not all grievances proceed to a hearing. Only grievances that challenge certain actions qualify for a hearing.

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#### *Actions Which AUTOMATICALLY Qualify*

§4.1(a)

1. Formal discipline (a **Written Notice**); and,
2. Dismissal for unsatisfactory performance.

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#### *Actions Which MAY Qualify*

§4.1(b)

The grievance should be qualified for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether one or more of the following has occurred:

1. Unfair application or misapplication of policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. **Arbitrary or capricious** performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law; or,

## 4 Qualification for a Hearing, continued

5. Adverse employment actions—for example, terminations, transfers, assignments, demotions, and suspensions—which are not accompanied by formal discipline (a Written Notice) but which are taken for disciplinary reasons.

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### ***Actions Which DO NOT Qualify***

§4.1(c)

Claims that relate solely to the following issues do not qualify for a hearing:

1. Establishment or revision of wages, salaries, position classifications, or general benefits;
2. Contents of statutes, ordinances, personnel policies, procedures, rules, and regulations;
3. Means, methods, and personnel by which work activities are undertaken;
4. Hiring, promotion, transfer, assignment, and retention of employees;
5. Termination, layoff, demotion, or suspension from duties because of lack of work, reduction in workforce, or job abolition;
6. Work activity accepted by an employee as a condition of employment or which reasonably may be expected to be a part of the content of the job;
7. Relief of employees from duties in emergencies; or,
8. Informal supervisory actions—for example, interim evaluations, counseling memoranda, and oral reprimands.

The fact that the claim challenges an action under this section does not preclude it from qualifying if (i) the grievance claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether the action was improperly tainted by discrimination, retaliation, misapplication of policy, arbitrary performance evaluation, or discipline.

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### ***Agency Head's Determination***

§4.2



Within 5 workdays of receiving the employee's hearing request, the agency head must determine whether the grievance qualifies for a hearing. The agency head must provide a written response on the grievance "Form A" or an attachment. The response should notify the employee of his procedural options. Because this is the last opportunity to resolve the grievance within the agency, the agency head may address the issues and the relief requested by the employee.

WHO	WHEN

- Management
- 5 workdays

## 4 Qualification for a Hearing, continued

### ***Appeal to EDR***

§4.3

If the agency head does not qualify the grievance for a hearing, the employee may appeal to the Director of EDR.



If the employee appeals to EDR, the employee must submit his grievance form to the agency's Human Resources Office within 5 workdays of receiving the agency head's qualification decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to EDR. (The original grievance record should be kept by the agency.)

\* **NOTE:** EDR rulings on qualification will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

WHO	WHEN

- Employee
- 5 workdays

### ***Circuit Court Appeal***

§4.4

If EDR does not qualify the grievance for a hearing, the employee may appeal that decision.



If the employee appeals, the employee must submit his grievance form to the agency's Human Resources Office within 5 workdays of receiving EDR's qualification decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. The Human Resources Office must list the EDR Director as a copy recipient on the cover letter to the court accompanying the grievance record. (The original grievance record should be kept by the agency.)

If the Human Resources Office does not forward the record to the court, the employee may request the court to issue an order requiring the transmittal of the record.

Within 30 calendar days of receiving the grievance record, the court, sitting without a jury, should hear the appeal on the record and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court may receive other evidence at its discretion. The employee may represent himself or may be represented by an attorney. No other person may represent the employee. The decision of the court is final and not appealable.

Courts have rules regarding the appearance of witnesses and the scheduling of hearings. Therefore, prior to the hearing, a party should contact the clerk of the circuit court to discuss these issues.

\* **NOTE:** Court decisions may be published in full on EDR's Web site. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

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- Employee
- 5 workdays

## **5** The Hearing

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### ***General***

§5.1

Most qualified grievances proceed to a hearing before a hearing officer.\* The hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment. This time can be extended only upon a showing of **just cause**. See also *Rules for Conducting Grievance Hearings* (7/1/2001), available on EDR's Web site, which addresses in more detail the hearing officer's duties and authority under the grievance procedure.

\*Certain qualified grievances with the Department of Corrections or the Department of Juvenile Justice are heard by a circuit court. See "Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice," §5.10.

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### ***Scheduling the Hearing***

§5.2

It is the responsibility of the hearing officer to notify the parties, either in writing or at a prehearing conference, of the date, time, and place of the hearing.

The hearing must be held in the locality where the employee is or has been employed. The agency must arrange a place for the hearing unless the hearing officer chooses to make the arrangements.

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### ***Prehearing Conference***

§5.3

A prehearing conference is encouraged. This conference can be conducted in person or by telephone. This conference provides an opportunity to improve the management of the hearing by addressing procedural and evidentiary issues.

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### ***Length of Hearing***

§5.4

A hearing is to last no more than one day, unless the hearing officer determines that the time is insufficient for a full and fair presentation of the evidence by both sides. The hearing officer may grant a postponement or extend the 30-day period for just cause.

---

### ***Absence from the Hearing***

§5.5

The parties must appear at the hearing or request a postponement. The hearing officer has the discretion to grant or deny a request for a postponement. However, the hearing and decision may go beyond the 30-day time limit only upon a showing of just cause.

At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the grievance record and the evidence presented at the hearing.

## **5** The Hearing, continued

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### ***Recording the Hearing***

§5.6

The agency is responsible for providing proper recording equipment, unless the hearing officer plans to provide it. The hearing officer is responsible for recording the hearing and preserving the recorded tapes as part of the grievance record. Either party may receive a copy of the recording, if requested, for the cost of reproduction. A court reporter is not required. If a party requests a court reporter, that party is responsible for the costs. Either party desiring a transcript should contact the court reporter directly.

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### ***Authority of the Hearing Officer***

§5.7

Hearing officers have the authority to:

1. Hold a prehearing conference;
  2. Require the parties to exchange a list of witnesses and documents;
  3. Issue orders for the appearance of witnesses at hearing and the production of documents;
  4. Decide whether non-parties may attend the hearing, however, a representative of EDR may attend any hearing;
  5. Record the hearing **verbatim**;
  6. Administer oaths;
  7. Admit evidence, exclude evidence, and accept **offers of proof** of excluded evidence;
  8. Rule on procedural requests;
  9. Render written decisions on qualified grievances and provide appropriate relief; and,
  10. Take other actions as necessary or specified in the grievance procedure.
- 

### ***Rules for the Hearing***

§5.8

Hearings are to proceed as follows:

1. Parties may represent themselves or may be represented by an individual of choice; this representative does not have to be an attorney;
2. In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a **preponderance of the evidence** that the action was warranted and appropriate under the circumstances;
3. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence;



## 5 The Hearing, continued

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4. Opening and closing statements may be made by each party;
  5. Formal rules of evidence do not apply;
  6. Testimony and exhibits may be admitted into evidence and made part of the record;
  7. Non-party witnesses are not to be present in the hearing except to give testimony and be cross-examined; and,
  8. The hearing should be closed to the public.
- 

### ***Hearing Officer's Decision***

§5.9

A hearing officer's decision must be in writing.\* The decision must contain findings of fact on the material issues and the grounds in the record for those findings. The hearing officer must send his decision by certified mail, return receipt requested, to each party and by First Class U.S. mail to EDR.

Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. In granting relief, the hearing officer should consider the relief requested in the written grievance.

\* **NOTE:** Hearing decisions will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

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### ***Examples of relief which may be available:***

§5.9(a)

1. Reinstatement to the employee's former position or, if occupied, to an objectively similar position;
  2. Upholding, reducing, or rescinding disciplinary actions;
  3. An award of full, partial, or no **back pay**, from which **interim earnings** must be deducted;
  4. The restoration of full benefits and seniority; and,
  5. An order that the agency comply with applicable law and policy.
- 

### ***Examples of relief which are not available:***

§5.9(b)

1. Damages or attorneys' fees;
2. Hiring, promotion, transfer, assignment, or retention of any employee;
3. Establishing or revising compensation, classification, or benefits;
4. Establishing or revising policies, procedures, rules, or regulations;

## **5** The Hearing, continued

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5. Taking any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance);
  6. Directing the methods, means, or personnel by which work activities are to be carried out; or,
  7. Any other relief that is inconsistent with the grievance statute or procedure.
- 

### ***Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice***

§5.10

Qualified grievances of employees of the Departments of Corrections or Juvenile Justice, whose employment was terminated for (i) client, inmate, or resident abuse, (ii) a criminal conviction, or (iii) being placed on court probation under the provisions of Va. Code §18.2-251, proceed to a hearing before the circuit court in the jurisdiction in which the employee had been employed. In its discretion, the court may refer the matter to a lawyer who serves as a commissioner in chancery to take such evidence as may be proper and to make a report to the court.

Parties may represent themselves or be represented by an individual of choice; this representative does not have to be an attorney. Such representatives may examine, cross-examine, question, and present evidence before the court. The court, sitting without a jury, must hear the evidence. The agency's action is to be upheld unless shown to have been unwarranted by the facts or contrary to law or policy. The decision of the court may be appealed by either party to the Court of Appeals pursuant to Virginia Code §17.1-405.

\* **NOTE:** Court decisions may be published in full on EDR's Web site. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

## **6** Noncompliance with The Grievance Procedure

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### ***General***

§6.1

From the time that a grievance is initiated until the hearing decision becomes final, a party or a hearing officer may fail to comply with a provision of the grievance procedure. A party may challenge such noncompliance to the Director of EDR, who is authorized to issue final, nonappealable rulings on compliance challenges.

A challenge to EDR will normally stop the grievance process temporarily. The grievance process will resume when EDR issues its ruling on the challenge.

## 6 Noncompliance with The Grievance Procedure, continued

\* **NOTE:** EDR rulings on compliance will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

### ***Grievance Initiation Noncompliance*** §6.2



The employee's "Form A" must comply with the requirements for initiating a grievance. See "Initiating a Grievance," §2.4.

If the "Form A" does not comply:

1. Management may notify the employee, using the "Form A," that the grievance will be administratively closed due to non-compliance;
2. The employee may request, within 5 workdays of receiving notice that the grievance will be closed, that EDR decide whether the grievance is in compliance and can proceed.

WHO	WHEN

- Employee
- 5 workdays

### ***Party Noncompliance*** §6.3



Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time. To remedy noncompliance, a party must:

1. Notify the other party in writing of the noncompliance (if the agency is out of compliance, written notice of noncompliance must be made to the agency head);
2. Allow the other party 5 workdays after receipt of the written notice to correct the noncompliance;
3. If the noncompliance is not corrected, the party may request a ruling from EDR (providing the other party with a copy of that request); the request must identify the specific requirement of the grievance procedure that has not been followed;
4. If the noncompliance is corrected within the 5 workdays, the party is considered in compliance and no relief will be available from EDR; and,
5. If the Director of EDR finds that a party has failed to correct the noncompliance within the 5 workdays, the Director may (i) order the party to correct the noncompliance, or (ii) where a substantial **procedural requirement** of the grievance procedure was violated without just cause, render a decision against the noncomplying party on any qualifiable issue.



- Employee
- Management
- 5 workdays

## 6 Noncompliance with The Grievance Procedure, continued

### Hearing Officer Noncompliance

§6.4



In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the hearing officer rules promulgated by the Director of EDR. If the hearing decision is out of compliance, a party may challenge the decision to the Director of EDR. (See “Administrative Review of Hearing Decisions”, §7.2). If the noncompliance arises in prehearing matters or in the conduct of the hearing, the hearing officer’s noncompliance may be remedied as follows:

1. An objection should be made to the hearing officer at the time the noncompliance occurs;
2. A ruling from EDR must be requested in writing no later than 10 calendar days after the party’s receipt of the hearing decision; and,
3. If EDR finds that the hearing officer has failed to comply with the grievance procedure, the sole remedy is an order by EDR that the hearing officer correct the noncompliance.



- Employee
- Management
- 10 calendar days

## 7 Review of Hearing Decisions

### General

§7.1

A hearing decision must be consistent with law and policy. A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

### Administrative Review of Hearing Decisions

§7.2

#### Types of Review

§7.2(a)



A hearing officer’s original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A copy of all requests must be provided to the other party and to the EDR Director.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

WHO

WHEN



- Employee
- Management
- 10 calendar days

## 7 Review of Hearing Decisions, continued

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2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management (“DHRM”). This request must refer to a particular mandate in state or agency policy. The Director’s authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director’s authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. (See also “Hearing Officer Noncompliance”, §6.4).

\* **NOTE:** All administrative review rulings or decisions may be published on EDR’s Web site in a manner that seeks to preserve personal privacy. See “Publication of Hearing Decisions, Rulings, and Related Court Opinions,” §8.1.

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### ***Transcripts of the Hearing***

§7.2(b)

An administrative reviewer may require a party to provide a full or partial transcript of the hearing to support the party’s position. Additionally, a party may elect to produce a transcript to support its position.

1. If the employee is ordered or elects to provide a transcript, the agency may obtain a copy directly from the court reporter at the agency’s expense.
2. If the agency is ordered or elects to provide a transcript, the employee must be allowed, upon request, reasonable access to the agency’s copy of the transcript in order to respond to the agency’s case. The employee may also obtain a copy of the transcript from the court reporter at the employee’s expense.

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### ***Administrative Review Decisions***

§7.2(c)

If multiple requests for administrative review are pending, a hearing officer’s decision on reconsideration or reopening should be issued before the Directors of DHRM and EDR issue their decisions.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 10 calendar days of receiving the request.

The DHRM and EDR Directors should issue written decisions on requests for administrative review within 30 calendar days of receiving the requests or within 10 calendar days of receiving the hearing officer’s decision on a request for reconsideration or reopening, whichever is longer. Administrative review decisions issued by the Directors of DHRM and EDR are final and nonappealable. If the DHRM or EDR Director orders the hearing officer to revise his decision, the hearing officer must do so and should issue a written decision within 10 calendar days of receiving the order.

## 7 Review of Hearing Decisions, continued

### ***Final Hearing Decisions***

§7.2(d)

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### ***Judicial Review of Final Hearing Decisions***

§7.3

#### ***Circuit Court Review***

§7.3(a)

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law.



An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from the Director of EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR explaining the basis for the appeal. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.



A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and to the EDR Director.

Within 10 calendar days of receiving the notice of appeal, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. (The original grievance record should be kept by the agency.)

If the Human Resources Office does not forward the grievance record to the court, the employee may request the court to issue an order requiring the transmittal of the record.

Within 30 days of receipt of the grievance record, the court, sitting without a jury, shall hear the appeal on the record. The court may affirm, reverse, or modify the final hearing decision. The court's decision shall be rendered within 15 days of the court hearing, which shall be at no cost to the parties.

#### ***Appeal to the Court of Appeals***

§7.3(b)

Either party may appeal the final decision of the circuit court to the Court of Appeals pursuant to Virginia Code §17.1-405.

WHO	WHEN

- Management
- 10 calendar days

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- Employee
- Management
- 30 calendar days

## **7** Review of Hearing Decisions, continued

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### ***Implementation***

§7.3(c)

Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring **implementation** of the final decision. The petitioning party must provide the EDR Director a copy of the petition. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation.

## **8** Additional Grievance Procedure Rules

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### ***Publication of Hearing Decisions, Rulings, and Related Court Opinions***

§8.1

EDR will publish rulings and hearing decisions on its Web site in a manner that seeks to preserve personal privacy. EDR may also publish related court opinions in full. See also EDR's Publications Policy on its Web site, at "Publications."

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### ***Documentation Relating to a Grievance***

§8.2

Absent just cause, all documents relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party. Documents pertaining to non-parties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance. A party shall not be required to create a document if the document does not exist.

If a document request is denied prior to the appointment of a hearing officer, the requesting party may seek relief from EDR pursuant to the rules for Party Noncompliance. See "Party Noncompliance", §6.3. After a hearing officer is appointed, relief should be sought from the hearing officer. See "Authority of the Hearing Officer," §5.7.

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### ***Computation of Time***

§8.3

In computing any period of time required by this procedure, the day of the event from which the designated period of time begins to run shall not be included.

Example: If a step-respondent receives the grievance "Form A" from an employee on Tuesday, then Wednesday is considered the first of the 5 workdays in which the step-respondent must respond to the grievance. Assuming a normal workweek (Monday through Friday), then Wednesday is counted as day 1 and the response from the step-respondent will be due on the following Tuesday, day 5.



## **8** Additional Grievance Procedure Rules, continued

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### ***Extension of Timeframes***

§8.4

Upon mutual agreement, parties to a grievance may extend all pre-qualification time limits including, but not limited to, the 30 calendar day grievance initiation requirement. After a hearing officer is assigned, a request for a postponement of the hearing must be directed to the hearing officer. All extension agreements should be in writing.

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### ***Consolidation of Grievances***

§8.5

If more than one grievance is pending involving the same parties, legal issues, policies, and/or factual background, either party may request consolidation. EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually. EDR may consolidate grievances without a request from either party.

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### ***Leave and Reimbursement***

§8.6

Employees are to be granted administrative leave to consult with EDR, to serve as a representative for an employee within the agency, and to appear as a witness in a grievance matter. Employees are also granted administrative leave to participate in the steps of the grievance process. Agencies may grant the employee reasonable time to prepare for the presentation of the grievance.

Reasonable costs for transportation, meals, and lodging are to be reimbursed in accordance with state travel regulations.

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### ***Reasonable Accommodations for Disabled Persons***

§8.7

The agency must provide reasonable accommodations for disabled persons participating in the grievance process.

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### ***Use of Agency Office Equipment***

§8.8

Grievances are official business. Therefore, in processing grievances, parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

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### ***Identifying Step Respondents and Agency Heads***

§8.9

Each agency has designated individuals to serve as respondents in the resolution steps. These designations are available at the agency's Human Resources Office.



## 9 Definitions

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**Agency Head** - The Director, Commissioner, or other appointed head of the state agency or the individual who has been delegated the authority to act for the agency head.

**Arbitrary or Capricious** - In disregard of the facts or without a reasoned basis.

**Attachments** - Documents joined with the grievance form in the resolution steps and in the qualification decision.

**Back Pay** - Retroactive payment of wages, bonuses, leave or other benefits, overtime (if a requisite of the job), and other forms of fixed compensation, as directed by the hearing officer.

**Cross-Examination** - Questioning by the opposing party to test the truth or further develop the prior testimony of a witness.

**Discrimination** - Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.

**Expedited Process** - A shortened process available for terminations, demotions or suspensions without pay, or loss of wages.

**Final Hearing Decision** - A hearing decision that has concluded the administrative review process and is subject to judicial review.

**First-Step Respondent** - The immediate supervisor of the employee (the individual responsible for completing the performance evaluation or giving daily work instructions).

**Grievance** - Written complaint on the grievance form stating the nature of the claim, the facts in support of the claim, and the relief requested.

**Harass** - Action taken with the intent or purpose of impeding the operations of the agency.

**Implementation** - An order issued by the court directing a party to carry out a final decision.

**Interim Earnings** - Income earned or received in lieu of state salary or other regularly earned compensation.

**Involuntary Separation** - Separation which is not of free will; resignation obtained through misrepresentation, deception, duress, coercion, or time pressure.

## 9 Definitions, continued

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**Just Cause** - A reason sufficiently compelling to excuse not taking a required action in the grievance process.

**Mediation** - Voluntary process through which individuals, with the assistance of mediators, may reach an agreement to resolve work-related issues.

**Noncompliance** - Failure to follow a grievance procedure rule.

**Offers of Proof** - Documents, testimony and other evidence offered but not admitted into the record.

**Party** - Either the employee who initiates the grievance or her employing agency.

**Preponderance of the Evidence** - Evidence which shows that what is sought to be proved is more probable than not; evidence that is more convincing than the opposing evidence.

**Procedural Requirements** - Formal procedures deemed essential to ensure fairness in the grievance process.

**Redaction** - To alter a document by removing personally identifiable information.

**Retaliation** - Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing").

**Second-Step Respondent** - An individual designated by the agency who is in a senior management position and has the requisite authority to provide the employee with the appropriate relief.

**Third-Step Respondent** - The agency head or an individual designated by the agency who is a deputy, assistant commissioner, director, or manager most senior in the employee's line of supervision and who has the last opportunity to resolve the grievance in the resolution steps.

**Verbatim** - Taken word by word but not necessarily transcribed.

**Workday** - Normal work schedule (excluding authorized leave time) for the individual responsible for taking the required action.

**Written Notice** - Formal written disciplinary action taken under the Standards of Conduct.

# TIPS FOR A SUCCESSFUL HEARING

**F**or many, the thought of going to a grievance hearing can be intimidating. Recognizing this, questions regarding hearings can be addressed via EDR's toll-free **AdviceLine (888) 23-ADVICE**. To foster a better understanding of the hearing process, the Department has posted its *Rules For Conducting Grievance Hearings* on its Web site at [www.edr.state.va.us](http://www.edr.state.va.us). The training is available to state employees who wish to learn how to present a case before a hearing officer.

## The Critical Time is Before the Hearing

After the grievance has been qualified for a hearing, immediately begin to organize. Learn what the witnesses will say, review all documents, and focus on your opponent's case as well as your own. Ask for a prehearing conference.

- At the prehearing conference, which can be by telephone, make sure that everyone agrees on what issues were qualified for the hearing, request the hearing officer to issue orders for the appearance of witnesses and for documents, and set the date, time, and place for the hearing.
- Prepare for the hearing by organizing your facts and events, developing appropriate exhibits, and preparing witnesses; an outline should be developed.

The hearing will follow an established order. In all grievances involving discipline or termination the agency goes first. For all other grievances, the employee goes first. Whoever goes first, is first for all actions from the opening statement, through the presentation of the evidence, to the closing statement.

## Opening Statements are the Road Maps for the Hearing

The purpose of the opening statement is to paint the picture for the hearing offi-

cer of your side of the story. It will be the road map that the hearing officer will use to follow the evidence. Without a clear opening statement, the hearing officer may get lost and not pick up on important evidence from a witness. A good opening statement should:

- summarize the facts that will be presented through witnesses and documents;
- tell why your view of the facts is more reasonable;
- point out the holes in the other's facts; and
- state what you want the hearing officer to do and why the outcome requested is fair.

Opening statements are not evidence. Therefore, you must make sure that the facts actually come into evidence through the words of your witnesses or documents.

## The Evidence

After the opening statements, witnesses are called and evidence is presented. The advanced preparation of witnesses is also important:

- plan the order of the witnesses carefully, place strong witnesses first or last because their statements will be most memorable;
- prepare an outline or list of the questions to ask witnesses;
- make sure the witnesses are able to tell the who, what, where, when, how and why of the story; and
- have witnesses introduce the documents.

Although the rules of evidence do not apply, some evidence will be more persuasive than others. The fact that evidence is received by the hearing officer does not mean that it will be given equal weight with other information. For example, an eyewitness is better than a person who only heard of the information from the eyewitness, or a witness is

better than the witness' written statement. A witness' opinion or conclusion is not as good as an account of the facts. The hearing officer will always be weighing the evidence to determine the more reliable and trustworthy evidence.

## Closing Statements Should Leave No Holes

When the examination of the witnesses is over, closing statements are made. Closing statements put everything in place; they bring all the points of evidence together into a simple understandable picture. It is important to prepare the elements of the opening statement before the hearing and then adapt it according to the evidence at the hearing. Elements that help make a successful closing statement include:

- telling the hearing officer the inferences that can be reasonably drawn from the evidence;
- emphasizing the positive points of your case and the weaknesses of the other's case; and
- explaining why the weaknesses of your case are not significant.

A closing statement need not be long, but it must tie everything together.

## The Painting Begins with The First Stroke

Throughout the hearing, from your entry into the room until the time you walk to your car, make sure that your demeanor reflects courtesy and respect for the other side and the process. It is key to demonstrate that you are reasonable and fair. Your attitude forms the background long before the hearing begins.

The hearing officer can make a mistake; if that happens ask respectfully for the mistake to be corrected. If the error is not corrected, contact the Department for a ruling within five days of receipt of the hearing decision. ■



# Department of Employment Dispute Resolution

## A RESOURCE FOR EMPLOYEES

*The Department of Employment Dispute Resolution (EDR), an agency of the Commonwealth of Virginia, provides services meeting the needs of employees and agency managers.*



### AdviceLine

#### Focusing on the Employee

When things get difficult at work, there is somewhere you can turn—**AdviceLine**. State employees experiencing employment related conflict may call **(888) 23-ADVICE**, toll-free, between 8:00 am – 5:00 pm, Monday through Friday, and talk with an EDR consultant. Consultants take the time to listen, to help you gather all the information, and to sort through the issues. Every call is important—because employee relations is our business. Consultants:

- respect your privacy;
- help you make sense out of confusing or conflicting situations;
- listen to your problems and concerns;
- answer questions on the grievance process;
- provide information on employment rights;
- assist with developing your best options;
- make referrals to appropriate people or resources;
- answer questions on mediation; and
- provide guidance on the path you choose.



### Mediation Services

#### Working it Out Together

Often, people find that they're in conflict at work without really understanding why. They can't talk to their boss, are having trouble with a co-worker, or have been disciplined in a way that they think was unreasonable. Mediation can be a great way to address these concerns. Mediation is:

- voluntary;
- confidential;
- conducted by trained, neutral parties;
- a way to explore underlying issues; and
- a way to design your own solution to the problem.



### Grievance Procedure

#### Ensuring a Fair Process

Sometimes initiating a grievance may be the best way to address your workplace concerns. Remember a grievance must be initiated in writing within 30 calendar days. Should you find yourself involved in a grievance, or even if you are just exploring the potential use of the grievance procedure, you may contact EDR, which will:

- provide forms and necessary information;
- determine all questions of access and other procedural issues;
- assure that parties abide by established rules — including time constraints;
- qualify grievances for hearings; and
- investigate claims of retaliation.

Learn about the grievance process by reading the *Grievance Procedure Manual*.



### Training Services

#### Skill-Building For Employees and Managers

Nobody likes employment conflict. EDR strongly believes that work-related conflict can be reduced through training. Classes, available to employees and managers, are small (on the average 18 people) and highly interactive. Training is offered each year throughout the state on:

- the grievance procedure;
- improving conflict management techniques;
- basic and advanced mediation;
- group mediation;
- train-the-trainer; and
- legal issues affecting the workplace.

The courses can be scheduled at your worksite.

#### Department of Employment Dispute Resolution

(888) 23-ADVICE (toll-free)

(804) 786-7994 (in Richmond)

TDD - both numbers

FAX (804) 786-0111

E-MAIL [administrator@edr.state.va.us](mailto:administrator@edr.state.va.us)

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[www.edr.state.va.us](http://www.edr.state.va.us)

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One Capitol Square  
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Equal Opportunity Agency